IN THE SUPREME COURT OF MISSOURI

Appeal No. SC85773

KEVIN S. BROWN and MELODY L. BROWN,

Respondents,

vs.

FIRST HORIZON HOME LOAN CORPORATION,

Appellant.

Appeal from the Associate Circuit Court of the County of Stoddard
State of Missouri

Honorable Joe Z. Satterfield

REPLY BRIEF OF APPELLANT

MARTIN, LEIGH, LAWS & FRITZLEN, P.C.

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TABLE OF CONTENTS

Table of Contents……..……...…….... 1

Points Relied On…….…..……..……..….. 2

Argument…….……..……... 5

Conclusion.…….……..…12

Certificate of Service.....…….....13

Certificate of Compliance With Rule 84.06(b)(c).....….14

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE THE BROWNS' MARCH 4, 2003 LETTER DID NOT INVOKE MO. REV. STAT. SECTION 443.130, WHICH IS "HIGHLY PENAL" IN NATURE AND MUST BE STRICTLY CONSTRUED, IN THAT THE LETTER DID NOT MENTION THE STATUTE AND DEMANDED ACTION BY FIRST HORIZON NOT REQUIRED BY THE STATUTE.

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE, EVEN IF THE BROWNS' MARCH 4, 2003 LETTER INVOKED MO. REV. STAT. SECTION 443.130, THE BROWNS FAILED TO PROVE THAT FIRST HORIZON DID NOT COMPLY WITH THE STATUTE IN THAT NO EVIDENCE WAS PRESENTED BY THE BROWNS REFLECTING THAT FIRST HORIZON DID NOT TIMELY DELIVER A SUFFICIENT DEED OF RELEASE.

III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORISON BECAUSE MO. REV. STAT. SECTION 443.130, AS APPLIED BY THE TRIAL COURT TO THE FACTS OF THIS CASE, VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT IS SO UNCLEAR THAT PERSONS OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT ITS MEANING.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE THE BROWNS' MARCH 4, 2003 LETTER DID NOT INVOKE MO. REV. STAT. SECTION 443.130, WHICH IS "HIGHLY PENAL" IN NATURE AND MUST BE STRICTLY CONSTRUED, IN THAT THE LETTER DID NOT MENTION THE STATUTE AND DEMANDED ACTION BY FIRST HORIZON NOT REQUIRED BY THE STATUTE.

In their brief, Browns acknowledge that they made a demand that "full and complete release be made" along with their tender of the recording costs. They acknowledge that the language of the statute requires that a sufficient deed of release be delivered to the person making satisfaction. It is clear that their letter did not demand the relief sought by the statute and therefore cannot invoke the statute.

In further support, Browns include in their appendix at A-1 through A-3 documents that were not part of the record in the trial court. However, even if such records are considered by this Court, they support First Horizon's position.

By the letter dated Thursday, April 10, 2003 (Appendix A-1) First Horizon states that "enclosed please find a duplicate original release/satisfaction you have

requested on the above loan number". First Horizon also indicates that it "has already sent the original release to be recorded on 3/21/03".

In this case, not only did First Horizon do specifically what Browns' asked, i.e., that a full and complete release be made, by sending the same for recording within the statutory time period, it also sent a duplicate original to the Browns. Since these documents were not part of the record below, it is difficult to tell whether the letter was sent in a response to a separate request (this is logical since First Horizon did return the tender of recording fees since they were made payable to the recorder rather than First Horizon). At any rate the purpose of the statute has been served. Browns suggest that the legislature wanted to provide motivation to mortgagees to "do the right thing" and release their liens in a timely fashion. In the case at bar, First Horizon took steps to have its lien released within ten days after receipt of the letter from Browns. First Horizon did "the right thing" yet nonetheless has been penalized.

Browns' own brief recognizes the weakness of their position. They posit: "if lenders would *file* their deeds of release within fifteen business days as a matter of course, just as borrowers make monthly payments, they would never be penalized." (Browns' Brief at p. 13). In this case, First Horizon has been penalized notwithstanding the fact that it sent a deed of release for filing within *ten* business days.

Browns also suggest that "the demand sent by the Browns put Appellant on notice that a prompt *filing* was expected" (Browns' Brief at p. 13, emphasis added). First Horizon agrees; however, if a prompt filing is what in fact the Browns expected, then they cannot collect the statutory penalty. This highlights the fact that First Horizon did comply with the letter.

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORIZON BECAUSE, EVEN IF THE BROWNS' MARCH 4, 2003 LETTER INVOKED MO. REV. STAT. SECTION 443.130, THE BROWNS FAILED TO PROVE THAT FIRST HORIZON DID NOT COMPLY WITH THE STATUTE IN THAT NO EVIDENCE WAS PRESENTED BY THE BROWNS REFLECTING THAT FIRST HORIZON DID NOT TIMELY DELIVER A SUFFICIENT DEED OF RELEASE.

The Browns' brief ignores the fact that they did not present any evidence concerning the delivery, or lack thereof, of a deed of release. Browns' confusion begins with their petition, which does not even allege that First Horizon failed to deliver a sufficient deed of release to the person making satisfaction. Their petition alleges that "Defendant refused and failed to release said real estate from lien" (L.F. 6).

To collect a statutory penalty, Browns must have plead and proved that a deed of release should have been delivered to them, but was not. This contention is not contained in their demand letter or their petition. The only reference is in the unsupported contention of fact found in their summary judgment suggestions (L.F. 51). Absent any evidence on an essential element of their claim, this Court should reverse the judgment of the trial court, and direct the entry of judgment in favor of First Horizon.

III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF THE BROWNS AND AGAINST FIRST HORISON BECAUSE MO. REV. STAT. SECTION 443.130, AS APPLIED BY THE TRIAL COURT TO THE FACTS OF THIS CASE, VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT IS SO UNCLEAR THAT PERSONS OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT ITS MEANING.

Browns suggest that First Horizon has raised constitutional questions for the first time on appeal: "Appellant failed to raise this constitutional challenge in its answer or motion for summary judgment or suggestions in support thereof." (Browns' Brief at 14, 15). The Browns' assertion is simply incorrect.

First Horizon's answer contained as affirmative defense number 14 the following: "in the alternative, section 443.130.1 R.S. Mo., upon which Plaintiffs relied for their claim, violates the Fifth and Fourteenth Amendments to the U.S. Constitution and is unconstitutionally vague because it is unclear as to the duties of a mortgagee, after receiving a demand for a deed of release, on what to do with the deed of release. The statute lacks sufficient notice so that persons of average intelligence must guess as to the statute's meaning. In addition the vagueness of statute means that Defendant and others under the same or similar circumstances, who must apply the statute, will be caused to make arbitrary and discriminatory application of its provisions" (L.F. 8, 9).

The constitutional argument was also raised in support of First Horizon's Motion for Summary Judgment: "to apply the statutes as imposing a penalty on First Horizon under these facts demonstrates that the statutes are vague and unconstitutional as applied to First Horizon" (L.F. 17). Since the issue was preserved for appeal, the constitutional argument should be considered by the Court, unless it believes that reversal is compelled under the first two points relied on.

Browns' argument at pages 16 and 17 of their brief highlights the problems with the statute. They suggest that upon receipt of a demand letter the mortgagee has three options. The first, they suggest, is to deliver the release to the person

making satisfaction together with the costs that the *mortgagor* had tendered. This makes no sense. If the demand letter requests that a release be made rather than that the release be delivered to the person making satisfaction, it has not invoked the statute. Further, if the process should be that the costs (tendered by mortgagor) should then be returned to the mortgagor, then the statute makes no sense in its requirement that the costs be tendered.

Respondents also suggest that First Horizon could deliver the release to the recorder and hope that it is recorded and delivered to the person making satisfaction in a timely fashion. In this case, since the demand requested that a full and complete release be made, First Horizon did deliver the release to the recorder within the time period provided by the statute. At that point it was out of First Horizon's hands and nothing further could have been done.

Finally, the Browns suggest that First Horizon could execute duplicate original releases and deliver one release to the person making satisfaction and deliver one release to the recorder of deeds together with the costs that had been advanced. If this is what the statute requires, or what the Browns had wanted, then their letter should have said so. If mortgagees must guess as to the proper way to proceed when receiving a vague demand, which does not invoke the statute and still be faced with a penalty, then the statute must be found to be unconstitutionally

vague. Browns' suggestion that at least three options exist, highlights the confusion created by the statutes.

CONCLUSION

For the forgoing reasons, the judgment of the trial court in favor of the Browns and against First Horizon should be reversed, and judgment entered in favor of First Horizon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing Brief and a disk in compliance with Rule 84.06(g) were mailed, first class, postage prepaid, to the person listed below this ____ day of May, 2004.

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06(c) AND (g)

The undersigned hereby certifies that the foregoing Reply Brief complies with the limitations set forth in Rule 84.06(b) and that the number of words in the Reply Brief is 1,880. The undersigned relied on the word count feature of his firm's word-processing system to arrive at that number.

The undersigned further certifies that the labeled disk, filed concurrently herewith, has been scanned for viruses and is virus-free.

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